**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

| | | |
|---|---|---|
| **AHMED ELMI** | ) | |
| Claimant | ) | |
| V. | ) | |
| | ) | Docket No. 1,049,412 |
| **TYSON FRESH MEATS, INC.** | ) | |
| Self-Insured Respondent | ) | |

## ORDER

Claimant appealed the February 10, 2015, Award entered by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on June 19, 2015, in Wichita, Kansas.

### APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for claimant. Randall W. Schroer of Kansas City, Missouri, appeared for respondent.

### RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties agreed that if the Board found claimant's injuries compensable, the claim would be remanded to the ALJ to determine the nature and extent of claimant's disability.

### ISSUES

The ALJ found the claim did not arise out of claimant's employment, stating:

> "Under the Act, the phrases arising 'out of' and 'in the course of' employment have distinct meanings, and both conditions must exist for a claim to be compensable." *Smith v. Winfield Livestock Auction, Inc.*, 33 Kan. App. 2d 615, 618, 106 P.3d 94 (2005). "An injury arises 'out of' employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." *Kindel v. Ferco Rental, Inc[.]*, 258 Kan. 272, 278, 899 P.2d 1058 (1995). "The phrase 'in the course of' employment relates to the time, place, and circumstances under which the accident occurred and means

> the injury happened while the worker was at work in the employer's service." 258 Kan. at 278. It is clear that the claimant was on the premises of the employer when his injury occurred but he had not began work. The argument and physical confrontation was not related to the work. It was of a personal nature. There is no causal connection between the conditions under which the work is required to be performed and the resulting injury. This claim did not arise out of the employment and is therefore, not compensable.[1]

Claimant asserts his accidental injury arose out of and in the course of his employment. He contends he injured his right shoulder when attacked by a coworker in respondent's cafeteria and fought back only in self-defense. At oral argument, claimant acknowledged his fight with the coworker was personal in nature, not about work and the assault by his coworker was not foreseeable to respondent. Claimant contends he sustained a 20% right upper extremity functional impairment as opined by Dr. Peter V. Bieri. Claimant requests medical benefits be left open based upon the recommendations of Dr. Pedro A. Murati. Claimant also requests the right to review and modification be left open.

Respondent requests the Board affirm the Award.

The sole issue before the Board is: did claimant's right shoulder injury arise out of and in the course of his employment with respondent?

## FINDINGS OF FACT

Claimant, a native of Somalia, testified that on December 29, 2009, while at work, he attempted to translate a conversation between an Ethiopian male employee and a Somalian female employee. Another coworker, Abdi Mohamed, approached claimant and told him he could not translate for the Somalian female employee. According to claimant, Abdi threatened to beat claimant if he continued translating.

The next day, December 30, 2009, claimant was in respondent's cafeteria getting tea when Abdi began cursing him and sat near him. Eventually, claimant cursed back. Abdi threatened to get him terminated for fighting and to kill him. Abdi then reached across the table and choked claimant with his shirt. Claimant told Abdi that if he wanted to fight they needed to go outside. He also told Abdi he did not want to fight or lose his job. According to claimant, they argued some more and Abdi began hitting claimant, so claimant struck back. Abdi twisted claimant's right arm and he felt pain. Claimant tried to get free, but was unable to do so until some coworkers separated them. Claimant testified he acted in self-defense.

---

[1] ALJ Award at 4.

Claimant testified he slides his badge when he goes "inside the company."[2] At the preliminary hearing, claimant testified his shift started at 2 p.m. and at the regular hearing he testified his shift began at 3:15 p.m. Claimant testified he had not yet put on his work clothes and his shift had not started when the altercation with Abdi began.

The reports of Drs. Terrence Pratt, Pedro A. Murati and Peter V. Bieri were stipulated into evidence, but none of the physicians testified. Dr. Pratt's March 16, 2012, report was admitted into evidence, but is not germane as he evaluated only claimant's left shoulder. A detailed discussion of claimant's medical treatment and the functional impairment opinions of the physicians is unnecessary because the sole issue is whether claimant's injuries are compensable.

## PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

On May 15, 2011, the Kansas Workers Compensation Act was amended to provide that a worker who voluntarily participates in fighting with a co-employee is not entitled to workers compensation benefits.[3] Prior to the 2011 amendments, case law generally provided guidance as to whether an employee injured in a fight with a coworker was entitled to workers compensation benefits. In this instance, claimant's injuries occurred before the 2011 amendments were enacted.

Prior to the 2011 amendments, injury by assault was generally compensable if the assault resulted from an argument about work.[4] Claimant acknowledged his altercation with Abdi was not about work. Claimant's testimony that he and Abdi fought over his conversation with a female coworker supports that admission. Moreover, Abdi's assault and the subsequent altercation occurred in respondent's cafeteria prior to claimant's shift and he had not yet dressed for work.

---

[2] R.H. Trans. at 21.

[3] See K.S.A. 2011 Supp. 44-501(a)(1)(E).

[4] *Brannum v. Spring Lakes Country Club, Inc.*, 203 Kan. 658, 455 P.2d 546 (1969) and *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

The appellate courts have ruled that a worker's injury resulting from a coworker's assault arising from a personal dispute is compensable if the employer could reasonably anticipate injury might result if the two workers continued working together. In *Harris*,[5] Kirkwood, Harris' coworker, without provocation struck Harris in the face while she waited for an elevator. Harris and Kirkwood had a history of disputes and Harris went so far as to file a police report after her supervisors did nothing to stop Kirkwood's behavior. The Kansas Court of Appeals held Harris' injury was compensable, even though the assault arose from a personal dispute, stating:

> Assuming the *Peavy* rule is still applicable, such rule is that injuries resulting from an assault on one employee by another are not compensable unless "the wrongful conduct has become habitual and the habit is known to the employer." *Peavy*, 112 Kan. at 639. This is a lesser test than what the Board applied here.
>
> In *Hallett v. McDowell & Sons,* 186 Kan. 813, 352 P.2d 946 (1960), our Supreme Court put forth an even less strict interpretation of the *Peavy* rule:
>
> > "[I]f an employee is assaulted by a fellow workman, whether in anger or in play, an injury so sustained does not arise 'out of the employment' and the employee is not entitled to compensation unless the employer had reason to anticipate that injury would result if the two continued to work together." 186 Kan. at 817.
>
> We believe the Board incorrectly concluded the foreseeability test has been totally abrogated in Kansas. Both the ALJ and the Board found that claimant had notified her supervisors of Kirkwood's previous behavior and, consequently, Bethany knew of this dangerous conduct. Further, Bethany knew of problems that Kirkwood had caused with other employees (problems that had required calling security). No evidence, however, indicates that Kirkwood had ever physically attacked another employee. Claimant testified that Kirkwood intentionally bumped into her while she was carrying a tray of hot soup, but all other evidence indicates that Kirkwood only verbally abused other employees.[6]

The Board finds there is insufficient evidence proving respondent was aware of a personal dispute between claimant and Abdi. Moreover, claimant admitted at oral argument that respondent could not reasonably foresee the assault by Abdi.

## CONCLUSION

The Board finds claimant failed to prove his personal injury by accident arose out of and in the course of his employment with respondent because:

---

[5] *Harris v. Bethany Medical Center,* 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

[6] *Id.* at 809-10.

1. The assault upon claimant arose from a personal dispute, not from a work-related issue.

2. It was not reasonably foreseeable to respondent that Abdi might become violent or assault claimant.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[7] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

## AWARD

**WHEREFORE,** the Board affirms the February 10, 2015, Award entered by ALJ Fuller.

**IT IS SO ORDERED.**

Dated this ____ day of July, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
kathleen@sraclaw.com

Randall W. Schroer, Attorney for Respondent
rschroer@mwklaw.com

Honorable Pamela J. Fuller, Administrative Law Judge

[7] K.S.A. 2013 Supp. 44-555c(j).